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Supreme Court, U.S.
FILED
MAR 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
# SUPREME COURT OF THE UNITED STATES
October Term, 1986

**No. 86-**

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SHERIDAN ROAD BAPTIST CHURCH, *et al.*,
*Petitioners,*

*v.*

STATE OF MICHIGAN,
DEPARTMENT OF EDUCATION, *et al.*,
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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## QUESTIONS PRESENTED

1.

A Michigan statute forbids the offering of regular instruction in religious schools by any person not state-licensed to teach. May the state, without violation of the Free Exercise and Establishment Clauses, enforce the statute through closure of the non-tax-supported schools of churches which, because of material religious objections, cannot comply with the statute?

2.

May the statute, without violation of the Free Exercise Clause, be enforced where to do so would deprive parents of a school which they had chosen for their children in the exercise of religious conscience?

3.

Would enforcement of the statute deprive the church and its congregation of rights of enterprise and property guaranteed by the Due Process Clause of the Fourteenth Amendment?

4.

Would enforcement of the statute deprive the parents of freedom, protected by the Ninth Amendment, to exercise parental rights in the choice of education for their children?

## LIST OF PARTIES

The parties to the proceedings below were:

Plaintiffs (Petitioners here)

Sheridan Road Baptist Church*
First Baptist Church Bridgeport*
Reverend Gerald Somero
Reverend Rene B. Ouellette
William L. Swain
Sharon Swain
Ronald Munson
Janice Munson
Mrs. Susanne Kwaitkowski

Defendants (Respondents here)

State of Michigan, Department of Education
Phillip E. Runkel, Superintendent of Public Instruction

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*In accordance with Rule 28.1, Sheridan Road Baptist Church and First Baptist Church Bridgeport state that each is a corporation which has no parent companies or subsidiaries (except wholly owned subsidiaries) or affiliates.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| LIST OF PARTIES | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | iv |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE WRIT | 9 |
| I. The Case Presents An Important Free Exercise Issue Not Yet Considered By This Court | 9 |
| II. There Exists A Conflict In State Court Decisions With Respect To State Licensing Of Religious School Teachers | 11 |
| CONCLUSION | 13 |

## TABLE OF AUTHORITIES


| Cases: | Page |
|---|---|
| *Board of Education v. Allen*, 392 U.S. 236 (1968). | 10 |
| *Goldman v. Weinberger*, 475 U.S. ___, 106 S.Ct. 1325 (1986) | 8 |
| *Hunt v. McNair*, 413 U.S. 734 (1973) | 9 |
| *Johnson v. Charles City Community School Board of Education*, 368 N.W.2d 74 (Iowa 1935), *cert. denied sub nom. Pruessner v. Benton*, ___ U.S. ___, 106 S.Ct. 594 (1985) | 12 |
| *Lemon v. Kurtzman*, 403 U.S. 602 (1971) | 9,10 |
| *Meek v. Pittenger*, 421 U.S. 349 (1975) | 9 |
| *Meyer v. Nebraska*, 262 U.S. 390 (1923) | 10 |
| *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) | 9 |
| *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) | 9,10 |
| *Rudasill v. Kentucky State Board of Education*, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 446 U.S. 938 (1980) | 12 |
| *Sherbert v. Verner*, 374 U.S. 398 (1963). | 8 |
| *State v. Rivinius*, 382 N.W.2d 270 (N.D. 1982), *cert. denied*, 460 U.S. 1070 (1983). | 12 |
| *State of Nebraska ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981), *appeal dismissed*, 454 U.S. 803 (1981) | 12 |
| *State of Ohio v. Whisner*, 47 Ohio St.2d 224, 351 N.E.2d 750 (1976) | 12 |
| *State of Vermont v. LaBarge*, 134 Vt. 226, 357 A.2d 121 (1976) | 11 |
| *Wisconsin v. Yoder*, 406 U.S. 205 (1972). | 8 |

TABLE OF AUTHORITIES—*(Continued)*


**Cases:** Page

*Wolman v. Walter*, 433 U.S. 229 (1977)..... 10

**Constitutions:**

United States Constitution:

Amendment I ..... *passim*

Amendment IX .....i,2,5

Amendment XIV ..... i,2,5,10

**Statutes and Regulations:**

28 U.S.C. §1257(3) ..... 2

1921 P.A. 302, §1, *et seq.*; M.C.L. §388.551, *et seq.*; M.S.A. §15.1921, *et seq.* ..... 2

1921 P.A. 302, §2; M.C.L. §388.552; M.S.A. §15.1922 ..... 3

1921 P.A. 302, §3; M.C.L. §388.553; M.S.A. §15.1923 ..... 3,7

1921 P.A. 302, §4; M.C.L. §388.554; M.S.A. §15.1924 ..... 4

1921 P.A. 302, §5; M.C.L. §388.555; M.S.A. §15.1925 ..... 4,6

1976 P.A. 451; M.C.L. §380.1561; M.S.A. §15.41561 ..... 2

1979 Mich. Adm. Code, R 390.1101, *et seq.* ..... 2,6

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# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

---

The petitioners, Sheridan Road Baptist Church, *et al.*, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Michigan, rendered by an equally divided vote, which was entered in the above entitled proceeding on November 24, 1986, a motion by petitioners for rehearing having been denied by that court on December 30, 1986.

## OPINIONS BELOW

The opinions of the Supreme Court of Michigan are reprinted in the Appendix hereto at A-1[1], A-23 and A-53 and are reported at 426 Mich. 462, 396 N.W.2d 373 (1986). The opinion of the Court of Appeals of Michigan is reprinted in the Appendix hereto at A-118, and is reported at 132 Mich. App. 1, 348 N.W.2d 263 (Mich. App. 1984). The opinion and order of the Circuit Court for the County of Ingham is reprinted in the Appendix hereto at A-142, and is not reported.

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1. The signal "A" refers to the appendices hereto.

## JURISDICTION

This case was decided and judgment was entered by the Supreme Court of Michigan on November 24, 1986. A motion for rehearing was denied December 30, 1986. The jurisdiction of this Court is invoked under Title 28 of the United States Code § 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

U.S. Constitution, Amendment IX:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

U.S. Constitution, Amendment XIV:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law;. . ."

1921 P.A. 302, § 1, *et seq.*; M.C.L. § 388.551, *et seq.*; M.S.A. § 15.1921, *et seq.*, reprinted in the Appendix at A-158.

1976 P.A. 451; M.C.L. § 380.1561; M.S.A. § 15.41561 reprinted in the Appendix at A-163.

Michigan Teacher Certification Code (1979 Mich. Adm. Code, R 390.1101, *et seq.*), reprinted in the Appendix at A-165.

## STATEMENT OF THE CASE

The two schools involved in this case were founded by the congregations of independent Baptist churches in

the late 1970s (J.A. 60a)[2] for the sole purpose of affording a specific and pervasively religious education to children. (J.A. 60a). The schools were placed under the governance of the churches, with the aim of "offering parents an alternative in education for their children whereby methods of instruction, curricula and teaching materials may be different from those found in the public schools, while yet producing students who achieve literacy, proficiency in basic learning and training in civic virtue." (J.A. 16a-17a). The schools have been built, maintained and staffed solely out of the free-will support of their religious patrons and sponsors and have refused all forms of local, state or federal tax support. (J.A. 15a, 72a). The schools' teachers are selected by the churches, first on the basis of spiritual qualification and then on the basis of ability to communicate general learning. (J.A. 64a-65a). They are paid out of church funds. (J.A. 60a).

Section 3 of the 1921 Michigan statute pertaining to "private, denominational and parochial schools" (hereinafter, the "Act")[3] provides in part:

> "No person shall teach or give instruction in any of the regular or elementary grade studies in any private, denominational or parochial school within this state who does not hold a certificate such as would qualify him or her to teach in like grades of the public schools of the state. . . ."

M.C.L. § 388.553; M.S.A. § 15.1923.

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2. "J.A." denotes the Joint Appendix filed in the Supreme Court of Michigan.

3. A "private, denominational and parochial school" is defined in Section 2 of the Act as "any school other than a public school giving instruction to children below the age of 16 years, in the first 8 grades as provided for the public schools of the state, such school not being under the exclusive supervision and control of the officials having charge of the public schools of the state." M.C.L. § 388.552; M.S.A. § 15.1922.

Section 4 of the Act provides that if the state Superintendent of Public Instruction "shall find that the violation complained of has been established", he shall order that compliance with the Act take place within 60 days. If the order is not obeyed within that time, the Superintendent "may close said school and prohibit the said person . . . operating . . . such private, denominational or parochial school from maintaining said school or from exercising any of the functions hereunder. . . ." Further, "[t]he children attending a private, denominational or parochial school refusing to comply with the requirements hereof after proceedings herein set forth shall be compelled to attend the public schools or approved private, denominational or parochial school under the provisions of the compulsory education act. . . ." M.C.L. § 388.554; M.S.A. § 15.1924.

Section 5 of the Act requires each private, denominational or parochial school to submit for examination "the qualifications of its teachers" and any refusal to do so "shall be considered sufficient cause to suspend the operation of [the] school. . . ." M.C.L. § 388.555; M.S.A. § 15.1925.

On December 10, 1979, the State Department of Education, citing the aforementioned statute, sent letters to the two schools (Sheridan Road Baptist School, Saginaw, Michigan, and Bridgeport Baptist Academy, Bridgeport, Michigan) threatening legal action unless the schools would furnish information contained in a "Teacher Information Sheet". (J.A. 600a, 605a). That form, reciting the Section 3 prohibition barring teaching, in religious schools, by non-state-certified teachers, required the schools to identify each of their teachers as being state-certified or not state-certified. (J.A. 591a). The two schools refused to fill out and return the form, stating as their ground that they could not, as a matter of doctrinal principle, recognize the validity of a law which requires a religious school to utilize as teachers, solely persons

licensed by the State. (J.A. 50a-53a, 67a, 95a-96a).[4] On July 1, 1980, the Attorney General of Michigan, on behalf of the State Department of Education, instituted administrative proceedings against the schools to suspend the schools' operation in accordance with the Act. (J.A. 27a).

On December 8, 1980, the petitioners Sheridan Road Baptist Church, the First Baptist Church, Bridgeport, the pastors of those churches, parents of children attending the two schools, and a teacher at Bridgeport Baptist Academy brought this action in the Circuit Court for the County of Ingham (Michigan) for a declaratory judgment that the application of the Act to the church-schools in question would be violative of, *inter alia*, the Free Exercise and Establishment Clauses of the First Amendment, and, as to the parent plaintiffs, their liberty, under the Ninth Amendment, to exercise conscientious choice of a religious education for their children. A declaration was also sought that application of the Act herein would deprive the religious parties of "rights of property and enterprise" contrary to the requirements of the Due Process Clause of the Fourteenth Amendment. These plaintiffs (the petitioners here) also sought an injunction restraining the State from taking action to impose the requirements of the Act on the schools.[5]

Insofar as the Act's certification requirements were concerned, petitioners' basis for objection was twofold.

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4. Testimony at trial established that not all of the teachers at the schools were certified or certifiable. (J.A. 21a, 168a).

5. The complaint also presented constitutional challenges to certain provisions of the Act pertaining to state licensing of religious schools, to State prescription of curriculum, and to reporting requirements. Before the Michigan Supreme Court, the State and petitioners both urged a limiting construction of the Act's licensing and curriculum requirements which would satisfy the State's interest and remove petitioners' constitutional objections. The Michigan Supreme Court hence dealt with the case as one concerning solely the teacher certification requirement.

First, they rejected, on religious grounds, the Act's requirements that no one might carry out a teaching ministry in the Churches' schools without a governmental license to do so (J.A. 23a, 67a, 68a) and that their teachers must be subject to ongoing state evaluation and surveillance. (J.A. 24a; M.C.L. § 388.555; M.S.A. § 15.1925). Second, the Teacher Certification Code, 1979 Mich. Adm. Code, R 390.1101, *et seq.*, contained provisions which imposed substantial limitations upon the freedom of the Churches' teaching ministry (J.A. 67a-71a), while lacking any utility to the schools (J.A. 71a-72a) whose pupils[6] were already achieving well in nationally standardized tests. (J.A. 119a-122a, 399a-455a).

The State filed an answer and counterclaim, Paragraph 30 of the answer admitting that the Department's complaints "seek a determination that the operations of said schools be suspended." (J.A. 39a). The counterclaim sought an injunction which (so far as relevant here) would require the two churches and their schools to submit records to the State respecting the qualifications of their teachers. The counterclaim also asked for a declaration that the Act is constitutional as applied to the "churches and the schools they operate."

A six-day trial ensued in April, 1982, in Ingham County Circuit Court during which petitioners called upon parents (J.A. 130a-145a), children enrolled in the schools (J.A. 145a), teachers (J.A. 168a) and nine state officials for testimony. (J.A. 100a-118a, 238a-276a, 286a-311a). Educational experts, including Dr. Donald A. Erickson of the Graduate School of Education of UCLA, also called by petitioners, testified to a "distinct lack of consensus" as to how teachers should be trained (J.A. 283a), concluding that state certification of nonpublic

6. Both Sheridan Road Baptist School and Bridgeport Baptist Academy have substantial numbers of black and other minority students. Their students are mainly drawn from lower middle income families.

school teachers did not represent a compelling societal interest. (J.A. 285a, 216a-217a). The State's expert witness, Dr. Judith Lanier, Dean of the College of Education, Michigan State University, testified that she knew of no educational research findings which demonstrated that the State certification of school teachers had resulted in better teaching. (J.A. 110a-111a).

The Circuit Court entered a memorandum decision December 29, 1982, making a finding that teacher certification does not ensure teacher competency. (A-142, A-148). The court held that the certification requirement of Section 3 of the Act interferes with the petitioners' free exercise rights and that it "causes excessive governmental entanglement with religion." (A-148).

The State appealed to the Michigan Court of Appeals which, on February 7, 1984, reversed, holding Section 3 constitutional as applied to petitioners. Petitioners appealed to the Supreme Court of Michigan. That court, on November 24, 1986, affirmed by an equally divided vote of three to three. Voting for affirmance, Chief Justice Williams[7] contended that any violation of the petitioners' religious beliefs was minimal (A-18), that a compelling state interest in furthering education dictated imposition of the teacher certification statute on petitioners' schools (A-17 - A-18), that no less restrictive means to achieve that interest was available (A-20), and that no impermissibly entangling relationships resulted from requiring all the teachers at the church-schools to be state-certified (A-22).

An opinion concurring with Chief Justice Williams, signed by Justices Boyle and Brickley, while agreeing with the result reached in the foregoing opinion, argued that a different standard of review should be applied:

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7. Chief Justice Williams is no longer a member of the Supreme Court of Michigan, having resigned on December 31, 1986.

> ". . . [E]ven the Supreme Court has acknowledged that certain government interests are so compelling that the state need not show that the means chosen is absolutely essential to further that interest, and that no lesser restrictive alternative could be substituted."

(A-37). The opinion relied on the less exacting free exercise test applied in the military setting in *Goldman v. Weinberger*, 475 U.S. ____, 106 S.Ct. 1325 (1986), finding that test to be equally applicable in free exercise cases which arise outside the military setting. (A-41).

Justices Riley, Levin and Cavanagh voted for reversal. Applying the standard of review in free exercise cases set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), their opinion concluded that the petitioners had stated a substantial claim of religious injury occasioned by imposition of the Act, and that the State had failed to carry its burden of proof that a compelling state interest dictated Michigan's requirement that a non-state-aided church-school must be shut down unless every one of its teachers was state-certified:

> "The state was unable to establish any relationship in fact between compliance with the administrative teacher certification rules and increased quality in teacher competence and student learning."

(A-98, n.57). The opinion noted that only six states (Michigan, Hawaii, Idaho, South Dakota, Iowa and Washington) impose state teacher certification on nonpublic schools. (A-98).

On December 30, 1986, the Supreme Court of Michigan denied petitioner's motion for rehearing. (A-156).

## REASONS FOR GRANTING THE WRIT

This case presents the question whether a state may shut down a church-operated school because of the church's refusal, on doctrinal grounds, to utilize solely state-licensed teachers. For two reasons the question is nationally significant and should now be addressed:

### I. The Case Presents An Important Free Exercise Issue Not Yet Considered By This Court.

Previous decisions of the Supreme Court have dealt with the nature of church-operated schools. The Court has described the strictly church-controlled school as "an integral part of the religious mission of its sponsoring church" (*Lemon v. Kurtzman,* 403 U.S. 602, 616 (1971)), in which "a substantial portion of its functions is subsumed in its religious mission" (*Hunt v. McNair,* 413 U.S. 734, 743 (1973)), and in which the secular and religious mission are " 'inseparably intertwined'." *Meek v. Pittenger,* 421 U.S. 349, 361 (1975). Further, the Court has stressed that the "*raison d'etre*" of church-schools is "the propagation of a religious faith", *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 503 (1979), the role of the teacher in fulfilling that mission being "critical and unique." *Id.* at 501.

But while, in some opinions of the Court, general expression has appeared as to regulation which the state may impose on such schools, that expression has consisted solely of dicta and was made without benefit of an evidentiary record devoted particularly to that point. Never before has the Court accorded plenary review to a challenge, by a church-school, on Free Exercise and Establishment Clause grounds, to a specific state-dictated regulation restricting the freedom to choose its teachers. The dicta have appeared in cases in which a state sought to render all religious schools unlawful (*Pierce v. Society*

*of Sisters*, 268 U.S. 510 (1925))[8], or to make it a crime to teach German in any school (*Meyer v. Nebraska*, 262 U.S. 390 (1923))[9], or to provide public aid to religious schools (*e.g., Board of Education v. Allen*, 392 U.S. 236 (1968)[10], *Lemon, supra, Wolman v. Walter*, 433 U.S. 229 (1977)).[11]

But in the present case the petitioners challenge the power of a state to say that a church-school, irrespective of a long record of proved achievement and strong parent approbation, may not use a single non-state-licensed person to offer regular instruction to its pupils. The churches resist the statute on religious grounds. These grounds the trial court found to be material and sincere, with substantial injury resulting to the practice of petitioners' beliefs through imposition of the licensing requirement. (A-145). The case thus proceeded on the issues of compelling state interest and least restrictive means. On those issues the ample trial record, made

8. The Court in *Pierce* specifically noted that no question was raised therein "concerning the power of the state reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require . . . that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." *Pierce*, 268 U.S. at 534.

9. *Meyer* involved a religious school but the challenge to the German language statute (under the Due Process Clause of the Fourteenth Amendment) was not presented on specific religious liberty grounds.

10. In *Allen*, which dealt with textbook loans to children in religious schools, the Court said that the state could insist that "attendance at private schools . . . be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction." *Allen*, 362 U.S. at 245-246.

11. "The State may require that schools that are utilized to fulfill the State's compulsory education requirement meet certain standards of instruction. . . and may examine both teachers and pupils to ensure that the State's legitimate interest is being fulfilled." *Wolman*, 433 U.S. at 240.

with testimony of nationally recognized educational experts, disproved the State's contention that its teacher-licensing program was of such critical societal necessity as to override the religious, parental and property rights maintained by petitioners. (J.A. 205a-222a, 276a-285a).

The case embraces two other questions of constitutional importance not yet considered by this Court: whether an individual has a free exercise right to pursue a religious vocation in the teaching of children in a church-school without a state license, and whether parents who desire a specific religious education for their children may be deprived of that opportunity, and their children shunted to schools unacceptable to them (J.A. 132a, 138a), because of a state requirement that a school must cease to exist if it will not bar non-licensed teachers from exercising their teaching function. Here again, a full-bodied record enables an exacting review of the questions. (J.A. 168a-172a (religious vocation), 130a-144a (parents)).

## II. There Exists A Conflict In State Court Decisions With Respect To State Licensing Of Religious School Teachers.

Religious schools exist in all states of the nation. Their number is increasing due to the strong growth of Protestant schools in the past decade. State regulation of religious schools varies extremely in degree and coverage. Most states prescribe minimum curriculum requirements. The highest courts of seven states have lately reviewed, in light of Religion Clause challenges, state teacher-licensing requirements as applied to church-schools. The decisions are in conflict.

In three states in which state teacher licensing was part of a body of statutes governing nonpublic schools, religious schools bringing Free Exercise and Establishment challenges to the overall regulatory scheme were upheld. See *State of Vermont v. LaBarge*, 134 Vt. 226,

357 A.2d 121 (1976) (application of statute requiring that child be enrolled in state-"approved" school held violative, on Religion Clause grounds, of right of parent to chose non-"approved" religious school for child's education); *State of Ohio v. Whisner*, 47 Ohio St.2d 224, 351 N.E.2d 750 (1976) (application of state "minimum standards", including mandatory teacher certification, to religious school, held violative of Establishment Clause and school's free exercise rights); *Rudasill v. Kentucky State Board of Education*, 589 S.W.2d 877 (Ky. 1979), *cert denied*, 446 U.S. 938 (1980) (application of state teacher certification requirement to religious school held violative of state constitution's Bill of Rights provision that no person shall be compelled to send a child to a school to which he is conscientiously opposed).

Holding state teacher certification requirements constitutional as against free exercise challenges are *State of Nebraska ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981), *appeal dismissed*, 454 U.S. 803 (1981); *State v. Rivinius*, 382 N.W.2d 270 (N.D. 1982), *cert. denied*, 460 U.S. 1070 (1983); *Johnson v. Charles City Community School Board of Education*, 368 N.W.2d 74 (Iowa 1985), *cert. denied sub nom. Pruessner v. Benton*, ____ U.S. ____, 106 S.Ct. 594 (1985); *Sheridan Road Baptist Church v. State of Michigan, Department of Education* (the present case).

In view of the widespread presence of religious schools in the nation and the seriousness of the free exercise problem presented in this petition (and potentially in many states), the conflict reflected in the above decisions should be resolved.

## CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the petition be granted.

Respectfully submitted,

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